Climate Action

RESEARCH

Open Access

Climate Litigation against companies

Marc-Philippe Weller* and Mai-Lan Tran

Abstract

The article takes the spectacular Shell ruling from The Hague as an opportunity to identify cross-jurisdictional problems of civil climate change litigation. The Shell case was the first climate action between private parties that was successful in the first instance and led to Shell's obligation to drastically reduce its greenhouse gas emissions, including its Scope 3 emissions. From the perspective of legal realism, the Dutch ruling provides a momentum for climate litigation worldwide. However, from the perspective of potential lawsuits for the reduction of CO_2 emissions against companies in Germany, one must assert that the Shell ruling cannot simply be transposed into the German legal order.

Keywords: Climate Litigation, Climate Change Litigation, Companies, Milieudefensie, Shell

Introduction

There is growing pressure on the "carbon majors"[1] to change their course in the fight against climate change. This pressure is also being exerted by the private sector.[2] In 2021, several developments attracted a great deal of attention:

(1) ExxonMobil's shareholders elected candidates of the activist hedge fund "Engine No.1" to the executive board of the American oil corporation despite fierce opposition from the company.[3] These candidates are supposed to bring about an "ecological transformation" (*grüne Wende*) of the group, which has largely insisted on maintaining the concept of fossil fuels.[4]

(2) Management of the energy group Chevron was taken by surprise when 61% of its shareholders voted in favour of a motion demanding that Chevron reduce its greenhouse gas emissions (including the so-called Scope 3 emissions).[5] Scope 3 emissions include all indirect emissions that result from a company's distribution, products or value chain. Thus, the product-related emissions of Chevron's business partners and customers, which result

[1] See *Heede*, "Carbon Majors: Accounting for carbon and methane emissions 1854-2010 – Methods & Results Report", 2014, https://climateaccountability.org/pdf/MRR%209.1%20Apr14R.pdf (2.3.2022).

[2] See *Durner*, Leistungskraft und Regelungstechniken des internationalen Klimaschutzrechts, EurUP 2021, p. 330 ff., on the multi-level system of climate protection under international law, Union law, and national law.

[3] Engine No. 1 was already guaranteed two places on 26 May 2021, and the third was confirmed the following week. See https://www.handelsblatt.com/unternehmen/energie/oelkonzern-aktivistische-aktionaere-erobern-dritten-platz-im-exxon-board/27251754.html?ticket=ST-10295613-7HcmCmSBN4fSqighIzpA-ap2 (2.3.2022).

[4] Engine No. 1, press release of 24 May 2021: "What the Board needs are directors with experience in successful and profitable energy industry transformations who can help turn aspirations of addressing the risks of climate change into a long-term business plan, not talking points."; "[ExxonMobil] […] has [for years] refused to take even gradual material steps towards being better positioned for the long-term in a decarbonizing world", https://www.businesswire.com/news/home/20210524005576/en/Engine-No.-1-Responds-to-ExxonMobil-Board-Announcement (2.3.2022).

[5] Follow this, Press release of 26 May 2021, https://www.follow-this.org/61-of-chevron-shareholders-support-follow-this-climate-resolution/ (2.3.2022).

*Correspondence: marc.weller@ipr.uni-heidelberg.de

Institute for Comparative Law, Conflict of Laws and International Business Law at Heidelberg University, Heidelberg, Germany

when they use energy purchased from Chevron, are also counted among Chevron's emissions.[6]

(3) This requirement to reduce CO_2 emissions does not apply only to Chevron: The Hague District Court ordered the British-Dutch competitor Royal Dutch Shell plc (hereinafter: Shell) to drastically reduce its greenhouse gas emissions, also including its Scope 3 emissions.[7]

Milieudefensie et al. v. Shell marked a spectacular turning point. For the first time, a climate action under private law brought by private parties against private parties ("private enforcement"[8])—an action that did not concern a specific project (linked to an industrial plant) but was directed against the effects of private action on the global climate as such—was successful.

The following discussion will address the ways in which this judgement may act as a catalyst. We will begin by outlining the concept of Climate Litigation, categorising climate actions into vertical (public-law) and horizontal (private-law) categories and the methodology (the "Climate Litigation" section). Then, we will summarise the salient points of the Shell decision (the "An overview of the Shell judgement of 26 May 2021" section) and identify those problem areas that span individual legal orders in horizontal climate actions, contextualising the statements of the Dutch judgement in the process (the "Cross-jurisdictional issues" section). Finally, we will discuss the effects of the Shell ruling on German companies (the "Can the statements of the Shell case be applied to German law?" section).

Climate Litigation

The concept of Climate Litigation

The term Climate Litigation has no fixed legal contour.[9] However, it is usually understood as including all legal proceedings related to the causes and consequences of anthropogenic climate change.[10] It includes cases that are directed against a single climate-damaging project as well as cases that concern the global climate as such. Climate Litigation forms part of the broader concept of climate action including all activities of various actors aiming to prevent or reduce climate-related damages to society.[11]

Types of Climate Litigation

Based on the person of the defendant in climate claims, a distinction can be made between vertical and horizontal climate claims.

Vertical climate actions

Vertical climate actions concern the relationship between private individuals and the state and address the question of sufficient state climate policy. They generally belong to the area of public law, i.e. they are brought before the administrative and constitutional courts. The state's duties to protect fundamental and human rights as well as its obligations under international law resulting from ratified international agreements constitute the yardstick of review.[12]

The most prominent example of a successful vertical climate action is the *Urgenda* case. This decision was ground-breaking because it was the first time that a court enjoined a state to comprehensively reduce CO_2 emissions: In 2019, the *Hoge Raad* ordered the Dutch state to reduce the country's greenhouse gas emissions by 25%—compared to 1990—by the end of 2020.[13] This action has already been replicated successfully in neighbouring

[6] See The Greenhouse Gas Protocol, a corporate accounting and reporting standard, Revised Edition, pp. 25, 29 ff., https://ghgprotocol.org/sites/default/files/standards/ghg-protocol-revised.pdf (2.3.2022).

[7] Rechtbank Den Haag, judgment of 26.5.2021 – Case C/09/571932 / HA ZA 19-379, ECLI:NL:RBDHA:2021:5339 (English translation); on this, see also *Gharibian/Pieper/Weichbrodt*, Climate Change Litigation – aktuelle Entwicklungen, BB 2021, pp. 2819, 2820 f.; *König/Tetzlaff*, "Forum shopping" unter Art. 7 Rom II-VO – neue Herausforderungen zur Bestimmung des anwendbaren Rechts bei "Klimaklagen", RIW 2022, p. 25 ff.; *Thielbörger*, Stärkere Klima-Verantwortlichkeiten von Unternehmen, NZG 2021, p. 1137 f.; *Verheyen/Franke*, Deliktsrechtlich begründete CO2-Reduktionspflichten von Privatunternehmen, ZUR 2021, p. 624 ff.; critically, *Wagner*, Klimaschutz durch Gerichte, NJW 2021, pp. 2256, 2257 ff. paras. 6 ff.; *Wegener*, Menschenrecht auf Klimaschutz?, NJW 2022, pp. 425, 430 paras. 34 ff.; *Milieudefensie* took this success as an opportunity to launch a campaign in mid-January 2022, demanding another 29 companies to publish plans for a far-reaching reduction in greenhouse gas emissions (at least 45% compared to 2019 levels by 2030), see https://en.milieudefensie.nl/news/logo-the-solution-is-less-pollution-milieudefensie-friends-of-the-earth-netherlands-demands-climate-plan-from-30-major-climate-polluters (1.3.2022).

[8] On the significance of private enforcement in the area of climate protection, see *Weller/Tran*, Klimawandelklagen im Rechtsvergleich – private enforcement als weltweiter Trend?, ZEuP 2021, p. 537 ff.

[9] *Rodi/Kalis*, Klimaklagen als Instrument des Klimaschutzes, KlimR 2022, p. 5, 5.

[10] For the use of the term, see for example *Gharibian/Pieper/Weichbrodt*, BB 2021, pp. 2819 ff.; Kahl/Weller (eds.), Climate Change Litigation, 2021; Sindico/Mbengue (eds.), Comparative Climate Change Litigation: Beyond the Usual Suspects, 2021.

[11] For the understanding of climate action underlying this journal, see *Tosun*, Addressing climate change through climate action, Climate Action 2022, p. 1, 1.

[12] Critically *Durner*, EurUP 2021, p. 330 f.

[13] Hoge Raad, Judgment of 20.12.2019 – Case 19/00135, ECLI:NL:HR:2019:2007 (English translation); on this, see de *Graaf/van der Veen*, Climate change litigation in the Netherlands – the Urgenda case and beyond, in: Kahl/Weller (eds.), Climate Change Litigation, 2021, p. 363, paras. 12 ff.; *Verschuuren*, Climate Change and the Individual in the Netherlands, in: Sindico/Mbengue (eds.), Comparative Climate Change Litigation: Beyond the Usual Suspects, 2021, p. 75 ff.

Belgium.[14] There are similar attempts currently underway in Italy[15] and Poland[16].

In Germany, the Constitutional Court's decision of 24 March 2021, which declared parts of the Federal Climate Protection Act unconstitutional,[17] is already considered "epoch-making".[18] It belongs in the category of vertical climate actions. The association Environmental Action Germany (Deutsche Umwelthilfe e.V.) has also filed constitutional complaints against several federal states.[19] By decision of 18 January 2022, however, the Constitutional Court did not accept any of the constitutional complaints for decision.[20] Still pending is a second constitutional complaint at the federal level, which children and young adults filed with the support of the association Environmental Action Germany on 24 January 2022.[21] It aims at a further tightening of the Federal Climate Protection Act.[22]

Horizontal climate actions

Horizontal climate actions brought by individuals against companies focus on the question of what responsibility private greenhouse gas emitters bear for the consequences of anthropogenic climate change. They are generally brought before civil courts and are typically based on claims under private law—usually torts—that protect the body, health, or property.[23] Fundamental and human rights as well as international agreements do not impose obligations on companies directly, but they do have an indirect horizontal effect. They allow, through the interpretation of general clauses and open elements of offences under tort law (such as "faute" or unlawfulness), for the further legal development of new duties of care and duties of care towards third parties that protect the climate.[24]

Already in the early 2000s, in various proceedings, individual states and private individuals in the USA tried—albeit unsuccessfully—to assign responsibility for climate change and damage resulting from climate change to the "carbon majors".[25] More recently, there has been a new wave of litigation,[26] which has now also reached Europe.[27]

In Germany, for instance, the case of the Peruvian farmer Saúl Ananías Luciano Lliuya against RWE AG (RWE), which is currently pending before the Higher Regional Court of Hamm (OLG Hamm), has attracted a great deal of media attention. At its core, Lliuya's action is based on the claim for removal and injunction pursuant to § 1004 of the German Civil Code.[28] It seeks the declaration that RWE will assume pro rata costs that Lliuya

[14] Tribunal de première instance francophone de Bruxelles, Section Civile, Decision of 17.6.2021 – Case 2015/4585/A.

[15] See http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2021/20210605_14016_na.pdf (2.3.2022); prior to this, *Luporini*, The 'Last Judgment': Early reflections on upcoming climate litigation in Italy, QIL, Zoom-in 77 (2021), p. 27 ff.

[16] See http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2021/20210607_14018_na.pdf (2.3.2022).

[17] German Constitutional Court (*Bundesverfassungsgericht*, BVerfG), Decision of 24.3.2021 – 1 BvR 2656/18, 1 BvR 78/20, 1 BvR 96/20, 1 BvR 288/20; on this, see for example *Faßbender*, Der Klima-Beschluss des BVerfG – Inhalte, Folgen und offene Fragen, NJW 2021, p. 2085 ff.; *Frenz*, Klimaschutz nach BVerfG-Beschluss und EU-Klimagesetz, EnWZ 2021, p. 201 ff.; *Möllers/Weinberg*, Die Klimaschutzentscheidung des Bundesverfassungsgerichts, JZ 2021, p. 1069 ff.; *Muckel*, Pflicht des Gesetzgebers zu effektivem Klimaschutz, JA 2021, p. 610 ff.; *Schlacke*, Klimaschutzrecht – Ein Grundrecht auf intertemporale Freiheitssicherung, NVwZ 2021, p. 912 ff.; *Sinder*, Anthropozänes Verfassungsrecht als Antwort auf den anthropogenen Klimawandel, JZ 2021, p. 1078 ff.

[18] *Altmaier*, Tweet of 29 April 2021, https://twitter.com/peteraltmaier/status/1387681285385203712 (2.3.2022); *Eifert*, Verfassungsauftrag zum freiheitsschonenden Klimaschutz: Der Klimaschutz-Beschluss des BVerfG, JURA 2021, pp. 1085, 1098; *Ekardt/Heß/Wulff*, BVerfG-Klima-Beschluss: Folgen für Bund, EU, Länder und Kommunen, EurUP 2021, pp. 212, 214.

[19] The constitutional complaints are available at https://www.duh.de/laenderklimaklagen/ (1.3.2022).

[20] German Constitutional Court, Decision of 18.1.2022 – 1 BvR 1565/21, 1 BvR 1566/21, 1 BvR 1669/21, 1 BvR 1936/21, 1 BvR 2574/21, 1 BvR 2575/21, 1 BvR 2054/21, 1 BvR 2055/21, 1 BvR 2056/21, 1 BvR 2057/21, 1 BvR 2058/21.

[21] The constitutional complaint is available at https://www.duh.de/fileadmin/user_upload/download/Pressemitteilungen/Umweltpolitik/Klimaschutz/Verfassungsbeschwerde_II_KSG_Bund_geschw%C3%A4rzt.pdf (1.3.2022).

[22] See Deutsche Umwelthilfe e.V., Neue Verfassungsbeschwerde gegen das Bundes-Klimaschutzgesetz, FAQ, https://www.duh.de/fileadmin/user_upload/download/Pressemitteilungen/Umweltpolitik/Klimaschutz/FAQ_Neue_Verfassungsbeschwerde_gegen_das_Bundes-Klimaschutzgesetz.pdf (1.3.2022).

[23] The question of whether corporate, accounting and capital market law are also called upon to ensure more effective climate protection is examined by *Fleischer*, Klimaschutz im Gesellschafts-, Bilanz- und Kapitalmarktrecht, DER BETRIEB 2022, p. 37 ff.

[24] Critically, *Durner*, EurUP 2021, pp. 330, 333: "no more limits to the legal art of interpretation", "open development of the law".

[25] But see *State of Connecticut v. American Electric Power Company (AEP)* 564 U.S. 410 (2011), *Ned Comer v. Murphy Oil USA* 718 F.3d 460 (5th Cir. 2013); *People of the State of California v. General Motors Corp.* 2007 WL 2726871 (N. D. Cal. 2007); *Native Village of Kivalina v. ExxonMobil Corp.* 2012 WL 4215921 (9th Cir. 2012); from German legal scholarship on this matter, see *Verheyen/Lührs*, Klimaschutz durch Gerichte in den USA – 2. Teil: Zivilrecht, ZUR 2009, p. 129 ff.

[26] From 2021, see, e.g., *City of Annapolis v. BP p.l.c.*; *Anne Arundel County v. BP p.l.c.* For an overview of these and similar proceedings, see http://climatecasechart.com/climate-change-litigation/case-category/common-law-claims/ (1.3.2022).

[27] *Setzer/Byrnes*, Global trends in climate change litigation: 2020 snapshot, Policy report, July 2020, S. 12, https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2020/07/Global-trends-in-climate-change-litigation_2020-snapshot.pdf (1.3.2022), p. 18 ff. (Figure 2.2).

[28] § 1004 of the German Civil Code: "(1) If the ownership is interfered with by means other than removal or retention of possession, the owner may require the disturber to remove the interference. If further interferences are to be feared, the owner may seek a prohibitory injunction. (2) The claim is excluded if the owner is obliged to tolerate the interference."

incurred for measures to protect his property which, he argues, is at risk of flooding due to the threat of glacier melt caused by climate change.[29] The requested cost-reimbursement rate of 0.47% is based on a 2014 study that provides a quantitative analysis of the historical emissions of the ninety largest private and state actors in the fossil fuel and cement industry, including RWE, for the period from 1854 to 2010.[30]

While the RWE proceedings concern the impending violation of an individual legal interest (property), an action that parallels the Shell proceedings has been pending in France since the beginning of 2020 against Total S.A. (Total). It involves the protection of a general interest, namely the global climate, independently of a violation of an individual legal interest. On the basis of the French Due Diligence Act of 2017 (the so-called *loi de vigilance*)[31], the plaintiffs (NGOs and individual municipalities) are demanding that Total be ordered to reduce its future emissions.[32]

Methodology

As it is not the first time that the Dutch courts have taken the lead in matters of climate protection—the *Urgenda* decision inaugurated the worldwide success of vertical climate actions, the Shell judgement prompts an analysis, using *the means of comparative law*, of whether it may also serve as a source of inspiration for horizontal climate actions in other legal orders. The method of comparative law is supplemented by a *dogmatic discussion* from the perspective of German law to examine the effects of the Shell ruling on German companies.

An overview of the Shell judgement of 26 May 2021

The Shell action was the first successful horizontal climate action (at least in the first instance) that focused on the protection of the global climate. The plaintiffs were the long-established Dutch non-governmental organisation *Milieudefensie* as well as other environmental associations and 17,379 individuals. The defendant was the parent company of the Shell Group, Royal Dutch Shell plc, headquartered in The Hague.

Concerning the question of admissibility, the District Court first addressed the admissibility of the class actions brought by *Milieudefensie* and the other environmental associations.[33] In the Netherlands, Art. 3:305a of the Dutch Civil Code allows foundations or associations to bring actions to protect the similar interests of *other* persons, to the extent that these interests correspond to the statutory purpose. At first, the court rejected the argument that the entire (future) world population shares a similar interest, on the grounds that this population would be affected by climate change in too many different ways.[34] But it assessed the interests of the *Dutch* population's present and future generations otherwise: In the court's view, their interests were suitable for bundling in a class action.[35] On this basis, it declared the class actions of virtually all the environmental associations participating in litigation admissible.[36] The court declared the actions of the 17,379 individuals inadmissible,[37] stating that they lacked a sufficiently concrete individual interest compared to the interests pursued by the class action.[38]

On the merits, the Hague District Court first reviewed the applicable law. Based on the connecting factor "event giving rise to the damage" (place of action) in Art. 7 of the Rome II Regulation, it arrived at Dutch tort law, since Shell makes its group-wide management decisions—at least to date[39]—in The Hague.[40] As a basis for the claim, the court turned to the general clause of Dutch tort law (Art. 6:162 of the Dutch Civil Code).[41] It focused its review on the question of whether it was possible to construct, from the unwritten tort standard of care, a duty

[29] Higher Regional Court of Hamm, Decision of 30.11.2017 – I-5 U 15/17, ZUR 2018, p. 118 ff., on this, see *Kling*, Die Klimaklage gegen RWE – Die Geltendmachung von Klimafolgeschäden auf dem Privatrechtsweg, KJ 2018, p. 231 ff.

[30] See statement of claim Lliuya ./. RWE AG of 23.11.2015, no. 8.2, https://germanwatch.org/sites/germanwatch.org/files/static/19019.pdf (2.3.2022); *Heede*, fn. 1.

[31] On this, see *Nasse*, Devoir de vigilance – Die neue Sorgfaltspflicht zur Menschenrechtsverantwortung für Großunternehmen in Frankreich, ZEuP 2019, p. 773 ff.; in detail, *Nasse*, Loi de vigilance, 2022 (forthcoming).

[32] See statement of claim Notre Affaire à Tous et al. v. Total S.A. of 28.1.2020, p. 48 ff.; on this, see *Hauterau-Boutonnet*, Première assignation d'une entreprise pour non-respect de son devoir de vigilance en matière climatique: quel rôle préventif pour le juge? Recueil Dalloz 2020, p. 609 ff., and, prior to this, *Sarliève,* Climate Change Legislation in France: A Work in Progress, in: Sindico/Mbengue (eds.), Comparative Climate Change Litigation: Beyond the Usual Suspects, 2021, pp. 485, 502.

[33] Rechtbank Den Haag, fn. 7, section 4.2.1 ff.

[34] Rechtbank Den Haag, fn. 7, section 4.2.3.

[35] Rechtbank Den Haag, fn. 7, section 4.2.4.

[36] The Court rejected only the class action brought by the environmental association ActionAid; it identified Africa as ActionAid's statutory centre of interest, see Rechtbank Den Haag, fn. 7, section 4.2.5.

[37] Rechtbank Den Haag, fn. 7, section 4.2.7.

[38] Rechtbank Den Haag, fn. 7, section 4.2.7.

[39] Following the judgment, Shell announced that it would move its administrative headquarters from The Hague to London. It cited taxation as the official reason for doing so. Yet there has been conjecture that the climate action pending on appeal in the Netherlands also has something to do with it. The extent to which the transfer of the registered headquarters ex nunc changes the applicable law under Article 7 of the Rome II Regulation (the so-called change of applicable law) must be the subject of another contribution.

[40] Rechtbank Den Haag, fn. 7, section 4.3.6.

[41] Rechtbank Den Haag, fn. 7, section 4.4.1.

for Shell to reduce the greenhouse gas emissions of the entire group.[42] The court affirmed this by *combining* and condensing various aspects into a duty of care, including (i) the group-wide corporate policy determined by Shell's parent company; (ii) the CO_2 emissions that can be attributed to the group; (iii) the consequences of CO_2 emissions for the Netherlands and, in particular, for the Wadden region; (iv) the right to life and the right to respect for the private and family life of Dutch residents that follows from the ECHR; (v) the UN Guiding Principles on Business and Human Rights (the so-called 'Ruggy Principles'); (vi) Shell's control and influence over the CO_2 emissions of the Shell group and its business partners; (vii) necessary measures to curb climate change; (viii) possible reduction pathways; (ix) the relationship between climate protection and growing energy demand; (x) emissions trading schemes, operating permits and Shell's role in providing the population with energy (…).[43]

After a 45-page review, the court finally ordered Shell to reduce its greenhouse gas emissions by 45% by 2030 compared to the reference year of 2019.[44] Even though Shell has now appealed the judgement,[45] it must nevertheless begin to implement the District Court's decision, since the judgement has been declared provisionally enforceable.[46]

Cross-jurisdictional issues

From the proceedings pending so far, we can identify, across various legal orders, a number of comparable legal questions and issues of climate liability under Private Law.

Private International Law

Environmental pollution knows no borders: This holds especially true for climate damage.[47] Ideally, therefore, the law should offer a global response. However, there is no harmonised global uniform law in tort law that is relevant here. Instead, questions of the forum and applicable law are regulated autonomously by the states concerned or by the EU. For cross-border climate actions, the courts must therefore first assess their international jurisdiction and decide which of the competing substantive laws shall apply in casu.[48]

Prima facie, the Shell case, unlike the RWE case, did not involve any cross-border element. The plaintiffs were primarily Dutch NGOs[49], Shell's main office is located in the Netherlands (at least to date),[50] and the plaintiff's accusation concerned a corporate policy established in The Hague.[51] However, the action's objective was to reduce CO_2 emissions worldwide, in particular, also those produced by group companies and business partners located abroad (Scope 3 emissions). It is therefore convincing that the Hague Court addressed questions of Private International Law.

International jurisdiction

In the EU, actions against legal entities can be brought at their registered seat, administrative seat, or the seat of their headquarters. The courts in these places have international jurisdiction pursuant to Art. 4 para. 1, 63 para. 1 of the Brussels Ibis Regulation. In addition, the special jurisdiction for torts under Art. 7 No. 2 of the Brussels Ibis Regulation allows the plaintiff to choose further places of jurisdiction at the place of action or the place of the effect of the contested tort. Here already, the questions arose that then became critical again in determining the applicable law under Art. 4 and 7 of the Rome II Regulation.

The first matter in dispute concerned the question whether the place of the corporate management decision or the establishment of a fundamental corporate policy should be regarded as the *place of action* within the meaning of Art. 7 No. 2 of the Brussels Ibis Regulation and should therefore be considered determinative of jurisdiction. To date, company decisions (contrary to the pollution itself by industrial plants) have been classified, for the most part, as mere preparatory acts, and thus not as the place of action.[52] The Hague District Court did not comment on this in the Shell judgement. But it also did not need to do so, since the place where corporate policy is decided is typically identical with one of the jurisdictions already covered under Art. 4 para. 1, 63 para. 1 of the Brussels Ibis Regulation. Consequently, in the Shell case, Art. 7 No. 2 of the Brussels Ibis Regulation did not offer any added value from the plaintiff's point of view.

But matters are different for the version involving the *place of effect* (place where the damage occurs) in Art. 7 No. 2 of the Brussels Ibis Regulation. Given that

[42] Rechtbank Den Haag, fn. 7, section 4.4 ff.

[43] Rechtbank Den Haag, fn. 7, section 4.4 ff.

[44] Rechtbank Den Haag, fn. 7, section 5.3.

[45] Neue Zürcher Zeitung, 20.7.2021, https://www.nzz.ch/wirtschaft/klimaurteil-gegen-shell-oel-und-gasproduzent-legt-berufung-ein-ld.1636646 (1.3.2022).

[46] Rechtbank Den Haag, fn. 7, sections 5,8.

[47] See *Kloepfer*, Umweltrecht, 2016, § 17 para. 38.

[48] On this issue, see *Lehmann/Eichel*, Globaler Klimawandel und Internationales Privatrecht, Zuständigkeit und anzuwendendes Recht für transnationale Klagen wegen klimawandelbedingter Individualschäden, RabelsZ 83 (2019), p. 77 ff.; *Weller/Nasse/Nasse*, Climate Change Litigation in Germany, in: Kahl/Weller (eds.), Climate Change Litigation, 2021, p. 376, paras. 40 ff.

[49] Rechtbank Den Haag, fn. 7, sections 2.1 ff.

[50] Rechtbank Den Haag, fn. 7, section 2.2.1.

[51] Rechtbank Den Haag, fn. 7, section 3.2.

[52] *Huber*, in: beckOGK, as of 1.10.2020, Art. 7 Rome II Regulation para. 37.

climate damages threaten to arise globally, companies fear that they can be taken to court *worldwide*. Scholars have therefore attempted to interpret the jurisdiction of the place of effect restrictively,[53] for instance, by turning to the mosaic theory developed for dispersed losses.[54] While the reasoning is not sufficiently convincing from a doctrinal perspective,[55] it is also not necessary in practical terms, since the territorial scope of the Brussels Ibis Regulation is limited, in any case, to the Member-State courts.[56] Therefore, companies in the EU need not fear being sued in a third state on the basis of Art. 7 No. 2 of the Brussels Ibis Regulation. [57]

The applicable rules of tort law

The rule of tort law applicable to climate damages must be determined pursuant to the Rome II Regulation. The general provision under tort law in Art. 4 of the Rome II Regulation is based on the place where the damage occurred (in other words, the place where the legal interest was violated or the place of effect). But there is a special rule for "environmental damage" in Art. 7 of the Rome II Regulation. It follows the so-called principle of ubiquity (*Ubiquitätsprinzip*) and allows the plaintiff to deviate from the law of the place of effect by instead unilaterally invoking the law "of the country in which the event giving rise to the damage occurred"—that is, the *law of the place of action*.[58]

The Hague District Court first stated succinctly that climate change is environmental damage. It thus affirmed the substantive scope of Art. 7 of the Rome II Regulation.[59] This subsumption presupposed that not only concrete pollution (e.g. due to a chemical accident) but also global warming caused by anthropogenic CO_2 emissions as such should already be qualified as environmental damage. Yet this stance is controversial.[60]

The Hague Court then came to the application of Dutch tort law by taking recourse to the place of action under Art. 7 of the Rome II Regulation.[61] This is remarkable insofar as the primary point of reference in climate liability constellations until now has been the place of the concrete greenhouse gas emission (e.g. the site of the power plant).[62] To date, previous corporate decisions of the management board have been disregarded as mere preparatory acts.[63] The Hague Court chose a different approach. It argued that the place where Shell's board of directors established the group's emissions and climate policy was an independent place of action.[64] Even though Art. 7 of the Rome II Regulation refers to "*the* harmful event", the Court maintained that in those situations in which *multiple* acts contribute to environmental damage, there is leeway to qualify each of these events as an independent place of action.[65] In the alternative, the Court elaborated that Art. 4 of the Rome II also led to the application of Dutch substantive law due to domestic violations of legal interests as a result of climate change.[66]

Since the plaintiffs in the Shell proceedings only claimed present and future emissions as the matter in dispute, it was not necessary to review the intertemporal applicability of the Rome II Regulation.[67] However, should future claims for damages be based (also) on emissions before 11 January 2009, it would be necessary to activate the forum state's autonomous Private International Law (in Germany: Art. 40 ff. of the

[53] *Lehmann/Eichel*, RabelsZ 83 (2019), pp. 77, 90 ff.

[54] The jurisdiction of the court seized at the place of effect is restricted to the damages that occurred (only) in the forum state, see CJEU, Judgment of 7.3.1995 – C-68/93 (Fiona Shevill, Ixora Trading Inc., Chequepoint SARL and Chequepoint International Ltd/Presse Alliance SA) para. 33; *Wagner*, Ehrenschutz und Pressefreiheit im europäischen Zivilverfahrens-und internationalen Privatrecht, RabelsZ 62 (1998), pp. 243, 279 ff.

[55] Climate change damages are not dispersed losses in the sense of the mosaic theory but rather classic torts involving distance, see *Weller/Nasse/Nasse*, Klimaklagen gegen Unternehmen im Licht des IPR, in: FS Kronke, 2020, pp. 601, 612; in this sense, see also *Kieninger*, Conflicts of jurisdiction and the applicable law in domestic courts' proceedings, in: Kahl/Weller (eds.), Climate Change Litigation, 2021, p. 119, para. 24.

[56] *Mankowski* in: Rauscher, Europäisches Zivilprozess- und Kollisionsrecht, vol. 1, 2021, preliminary remarks on Art. 4, para. 25; *Kieninger*, fn. 55, p. 119, para. 22; *Spitzer/Burtscher*, Liability for Climate Change: Cases, Challenges and Concepts, JETL 2017, pp. 137, 151.

[57] Of course, the third state's autonomous law on international jurisdiction may result in a place of jurisdiction under tort law in that state. Even a restrictive interpretation of the Brussels Ibis Regulation cannot change this fact.

[58] On the regulatory objective, see *Fuchs*, Zum Kommissionsvorschlag einer "Rom II"-Verordnung, GPR 1 (2004), pp. 100, 103; *Matthes*, Umwelthaftung unter der Rom II-VO, GPR 8 (2011), pp. 146, 149.

[59] Rechtbank Den Haag, fn. 7, section 4.3.2; see, in detail, *König/Tetzlaff*, RIW 2022, pp. 25, 27 ff.

[60] See *van Loon*, Warming up for climate litigation around the world – recent court cases from The Netherlands, Germany and the United Kingdom, in: Festschrift für Lawrence Collins, section IV. 6 (forthcoming).

[61] Rechtbank Den Haag, fn. 7, section 4.3.6.

[62] *Kieninger*, fn. 55, p. 119, para. 48; *Lehmann/Eichel*, RabelsZ 83 (2019), p. 77, 96; *Weller/Nasse/Nasse*, fn. 48, p. 377, para. 60; but see *Mankowski*, Internationalprozess- und internationalprivatrechtliche Aspekte von grenzüberschreitender Climate Change Litigation in Deutschland, in: FS Schmehl, 2018, pp. 557, 560 f.

[63] *Huber*, in: BeckOGK, as of 1.10.2020, Art. 7 Rome II Regulation, para. 38; *Kieninger*, fn. 55, p. 119, para. 48; *König/Tetzlaff*, RIW 2022, pp. 25, 37; in a different context, see *Wagner*, Haftung für Menschenrechtsverletzungen, RabelsZ 80 (2016), p. 717, 743 f., but see *Mansel*, Internationales Privatrecht de lege lata wie de lege ferenda und Menschenrechtsverantwortlichkeit deutscher Unternehmen, ZGR 2018, p. 439, 459 ff.

[64] Rechtbank Den Haag, fn. 7, section 4.3.5; in the result, in agreement, *König/Tetzlaff*, RIW 2022, pp. 25, 38 f.

[65] Rechtbank Den Haag, fn. 7, section 4.3.6.

[66] Rechtbank Den Haag, fn. 7, section 4.3.7.

[67] On the interpretation of Article 31 of the Rome II Regulation, which is decisive here, see CJEU, Judgment of 17.11.2011 – C-412/10 (Deo Antoine Homawoo v GMF Assurances SA.) para. 33.

German Introductory Act to the Civil Code), in force prior to the Rome II Regulation, in order to determine the applicable tort rule.[68]

The special rule pursuant to Art. 17 of the Rome II Regulation can be used to loosen or modify the tort rule in Art. 4 and 7 of the Rome II Regulation.[69] This rule establishes that the rules of safety and conduct in force at the place of action shall be taken into account. However, they are only considered at the level of substantive law (local and moral data approach[70]). Accordingly, the Hague Court discussed the provision's significance in connection with emissions certificate trading and operating permits issued at the location of the plant only at the level of the applicable substantive law (here Dutch law).[71]

Tortious liability

From a plaintiff's perspective, substantive law presents the greatest hurdles for climate actions.

Bases for claims

Cross-jurisdictionally, the applicable rules of tort law offer most of the bases for claims for the liability of private greenhouse gas emitters. From a conflict of laws classification perspective, these rules also include provisions for claims to prevent property damage (e.g. § 1004 of the German Civil Code).[72] Considered from a comparative functional angle, various legal orders mostly have parallel prerequisites of tortious liability.[73] Differences may emerge if a legal order has strict rules of liability, independent of fault (*Gefährdungshaftung*), that can be utilised for climate actions.[74]

The Shell lawsuit is based on Art. 6:162 of the Dutch Civil Code, the general clause of Dutch tort law. In France, the *loi de vigilance* passed in 2017, which imposes the duty on large companies to draw up a risk and action plan focused on human rights and environmental protection and serves as the basis for the lawsuit pending against Total, explicitly refers to the tort law of the French Civil Code.[75] Lliuya has based his action against RWE on § 1004 of the German Civil Code, the claim to removal and injunction in cases of property infringement.[76]

The problem of violations of legal interest

Climate change as a problem of the commons[77] raises the question of the scope of the protection of legal interests because global warming as such does not involve a violation of individual legal rights. The institution of the "public nuisance" under common law serves as a legal institution that can establish liability under private law if common interests have been violated.[78] By contrast, systems of civil law deal primarily with the violation of individual legal interests,[79] as is the case for the tortious general clause under German law (§ 823 para. 1 of the German Civil Code). Neither the environment, the climate nor specific climatic phenomena as such are protected under this clause.[80] They are only afforded indirect protection *to the extent* that individual legal interests are also affected, as is true for the property of the plaintiff Lliuya in the RWE case.[81] The Hague District Court, too, cited impending violations of individual legal interests by addressing how climate change may impair the life and limb of the Dutch population in the Wadden Region, which is at risk of flooding.[82]

[68] *Kieninger*, fn. 55, p. 119, para. 42.

[69] *Weller/Nasse/Nasse*, fn. 48, p. 377, para. 54 ff.; *Kieninger*, fn. 55, p. 119, para. 50 ff.; *König/Tetzlaff*, RIW 2022, pp. 25, 35; cf. also *Spitzer/Burtscher*, JETL 2017, pp. 137, 154 f.

[70] *Harms*, Neuauflage der Datumtheorie im International Privatrecht, 2019; *Weller*, Die Datumtheorie, in: Gebauer/Mansel/Schulze (eds.), Liber Amicorum Erik Jayme – Die Person im IPR, p. 53 ff.

[71] Rechtbank Den Haag, fn. 7, sections 4.4.1 f.; 4.4.44 ff.

[72] *Weller/Tran*, ZEuP 2021, pp. 573, 597.

[73] *Wagner*, RabelsZ 80 (2016), pp. 717, 751; *Spitzer/Burtscher*, JETL 2017, p. 137, 155 f.

[74] *Weller/Tran*, ZEuP 2021, pp. 573, 597.

[75] Art. L. 225-102-4 para. 1 of the French Commercial Code: "Toute société qui emploie, à la clôture de deux exercices consécutifs, au moins cinq mille salariés en son sein et dans ses filiales directes ou indirectes dont le siège social est fixé sur le territoire français, ou au moins dix mille salariés en son sein et dans ses filiales directes ou indirectes dont le siège social est fixé sur le territoire français ou à l'étranger, établit et met en œuvre de manière effective un plan de vigilance."; Art. L. 225-102-5 para. 1 of the French Commercial Code: "Dans les conditions prévues aux articles 1240 et 1241 du code civil, le manquement aux obligations définies à l'article L. 225-102-4 du présent code engage la responsabilité de son auteur et l'oblige à réparer le préjudice que l'exécution de ces obligations aurait permis d'éviter."

[76] See statement of claim, Lliuya v. RWE AG, fn. 30, p. 1 ff.

[77] *Wagner*, Klimahaftung vor Gericht, 2020, p. 112; *Wagner*, NJW 2021, pp. 2256, 2257 para. 7.

[78] See United Nations Environment Programme, Global Climate Litigation Report, 2020 Status Review, 2020, p. 42; *Spitzer/Burtscher*, JETL 2017, pp. 137, 144; *Weller/Tran*, ZEuP 2021, pp. 573, 597.

[79] See United Nations Environment Programme, 2020, fn. 84, p. 42; United Nations Environment Programme, The Status of Climate Change Litigation: A Global Overview, 2017, p. 34.

[80] Prevailing opinion, see, on environmental goods only, *Hager*, in: Staudinger, BGB, 2017, § 823 of the German Civil Code, para. B 188; *Wagner*, in: MünchKomm, BGB, 2020, § 823 of the German Civil Code, para. 354 ff.; on assets, see German Federal Court of Justice (*Bundesgerichtshof*, BGH), judgment of 4.2.1964 – VI ZR 25/63, juris para. 11.

[81] *Weller/Tran*, ZEuP 2021, pp. 573, 597 f.

[82] Rechtbank Den Haag, fn. 7, section 4.4.6.

Causation and attribution

Much of the debate on climate liability law revolves around the question of the causation and attribution giving rise to liability.[83]

The relationship of cause and effect (attribution)

The first problem is whether a sufficiently close relationship of cause and effect can be established between individual damaging events and the emissions of a specific company (attribution or imputability). Such a causal link was denied, for example, in *Comer v. Murphy Oil USA*.[84] In these proceedings, the plaintiffs sought to hold the oil industry liable for damages caused by Hurricane Katrina, claiming that the hurricane was a manifestation of extreme weather events due to climate change. The Court held that there was not sufficient proof of a close link between the defendants' emissions and the hurricane damage.[85]

Since then, considerable progress has been made in attribution science tracing regional and local environmental changes back to global earth warming,[86] which needs to be translated into law.[87] One example is a study conducted by the University of Oxford and the University of Washington related to the RWE case concluding that the flood risk to Huaraz, the home town of the plaintiff in the RWE case, is almost entirely caused by anthropogenic climate change.[88] The Court in the RWE case is still taking evidence on the multi-stage chain of causation from greenhouse gas emissions to global temperature increases and local climatic changes to concrete (impending) individual damage.[89]

In the Shell proceedings, the Hague District Court chose not to hear evidence. In its decision, it referred instead to the reports of the Intergovernmental Panel on Climate Change (IPCC) and the Royal Netherlands Meteorological Institute.[90] The courts in the *Urgenda* case had already referred to the findings of such specialised institutions, which collect and assess the current state of global climate research.[91] In its decision of 24 March 2021, the German Constitutional Court also relied on IPCC reports as well as on reports of the German Environment Agency and the German government's scientific advisory body on environmental issues.[92]

There is an essential difference between these three proceedings and the RWE case: In the Shell, *Urgenda*, and Karlsruhe cases, it was not necessary to consider the last stage of causation because each of these decisions focused on the question of future emissions. Consequently, there was no need to trace an individual violation of legal interests back to a defendant's concrete emissions. It was enough that the courts, by referring to the IPCC reports, affirmed the causal link between greenhouse gas emissions and climate damage in general.

Multiple emitters

The plaintiff's side faces another problem of imputability due to the fact that the greenhouse effect is a consequence of the combined actions of countless emitters whose individual contribution to the total emissions is negligible.

Like the Dutch state in *Urgenda* and the German *Bundestag* in its response to the constitutional complaints that led to the Karlsruhe Court's climate decision, Shell, too, tried to deny responsibility for climate change by citing the large number of emitters: It argued that its own contribution is negligible and that the obligation to reduce emissions is ineffective.[93] Moreover, Shell claimed that the space it would vacate in the energy sector in

[83] See for example *Chatzinerantzis/Appel*, Haftung für den Klimawandel, NJW 2019, pp. 881, 882 ff.; *Frank*, Klimahaftung und Kausalität, ZUR 2013, p. 28 ff.; *Frenz*, Klimahaftung der Energiekonzerne, RdE 2021, pp. 61, 63 ff.; *Pöttker*, Klimahaftungsrecht, 2014, pp. 33 ff., 140 ff., 306 ff., 418 ff.; *Schirmer*, Klimahaftung und Kausalität – und es geht doch! JZ 2021, p. 1099 ff.; *Sindico/Mbengue/McKenzie*, in: Sindico/Mbengue (eds.), Comparative Climate Change Litigation: Beyond the Usual Suspects, 2021, pp. 1, 21 f.; *Wagner/Arntz*, Liability for Climate Damages – Germany as an International Pioneer?, in: Kahl/Weller (eds.), Climate Change Litigation, p. 405, paras. 44 ff.

[84] *Ned Comer v. Murphy Oil USA*, 2012 WL 933670, p. 20 ff. (S. D.Miss. 2012).

[85] *Ned Comer v. Murphy Oil USA*, 2012 WL 933670, p. 20 ff. (S. D.Miss. 2012).

[86] For instance in relation to the 2021 floods in Germany, see *Kreienkamp et al.*, Rapid attribution of heavy rainfall events leading to the severe flooding in Western Europe during July 2021, https://www.worldweatherattribution.org/wp-content/uploads/Scientific-report-Western-Europe-floods-2021-attribution.pdf (12.4.2022).

[87] On the role of science in climate litigation, *Buizza et al.*, The Role of Science in Climate Change Litigation, blog post of 6 December 2022, https://www.biicl.org/blog/29/the-role-of-science-in-climate-change-litigation?cookiesset=1&ts=1649760591 (12.4.2022).

[88] *Stuart-Smith/Roe/Li/Allen*, Increased outburst flood hazard from Lake Palcacocha due to human-induced glacier retreat, (2021) 14 Nature Geoscience, p. 85 ff.

[89] Higher Regional Court (*Oberlandesgericht*, OLG) Hamm, para. 23, pp. 118, 119; critically, *Frenz*, RdE 2021, pp. 61, 67.

[90] Rechtbank Den Haag, fn. 7, sections 2.3.5, 2.3.6.

[91] Rechtbank Den Haag, Judgment of 24.6.2015 – Case C/09/456689 / HA ZA 13-1396, ECLI:NL:RBDHA:2015:7196 (English translation), sections 2.8 ff., 4.11 ff., and Hoge Raad, fn. 9, sections 2.1, 4.4 f., 7.2.1; on this, see also *Hänni*, Menschenrechtlicher Schutz in der Klimakrise – Das Leiturteil Urgenda, EuGRZ 2020, pp. 616, 624, 628 f.; *Sindico/Mbengue/McKenzie*, fn. 83, pp. 1, 22 f.

[92] German Constitutional Court, fn. 13, paras. 16 ff.; in favour, *Calliess*, Das "Klimaurteil" des Bundesverfassungsgerichts: "Versubjektivierung" des Art. 20 a GG?, ZUR 2021, p. 355; more critically, *Ekardt/Heß/Wulff*, EurUP 2021, pp. 212, 214 f.

[93] Rechtbank Den Haag, fn. 98, section 4.78; German Constitutional Court, fn. 17, para. 75; Rechtbank Den Haag, fn. 7, section 4.4.49.

order to meet emission targets would be taken up immediately by competitors (substitution).[94]

The District Court did not accept this objection of alternative behaviour (which would not have any impact on climate change)[95] on the grounds that it presupposed a "business as usual" scenario, failing to recognise that competitors were increasingly forced, both internally and externally, to make their business models (more) climate-friendly.[96] The court stated that even if Shell could not solve the global problem of climate change alone, it had to contribute to solving the problem.[97] The *Hoge Raad* had already advanced this reasoning in *Urgenda* by ordering the Dutch state "to do its part".[98] The German Constitutional Court also did not accept the argument that other states' emissions should relieve the Federal Republic of its responsibilities.[99]

Unlawfulness: the duty of care towards third parties to reduce CO2 emissions?

Private Climate Litigation revolves around the question of whether or to what extent private emitters have a duty to reduce their greenhouse gas emissions. Either such a reduction obligation is the direct subject of the claim, as in the Shell case, or it is derived from an *unwritten* duty of care towards third parties that aims to adopt measures against the "source of danger CO_2 emissions".

Many German legal scholars remain sceptical about a duty of care towards third parties (*Verkehrspflicht*) to reduce CO_2 emissions.[100] They argue that greenhouse gas emissions are (still) an inevitable component of ensuring a stable energy supply for society.[101] A reduction obligation would threaten the general public's stable energy supply, which the German Constitutional Court has in fact recognised as the basis of a dignified existence.[102] Moreover, emitters have permits and emission allowances under public law.[103] Scholars argue that the unity of the legal order requires that these be respected.[104] Cross-jurisdictionally, disregarding permits would mean running the risk that the judgement would not be recognised and enforced in the state that issued the permits under its Public Law.[105]

Shell: the duty to reduce CO2 emissions derived from Art. 6:162 of the Dutch Civil Code

In contrast to the prevailing opinion in German law, the Hague District Court, basing itself on the Dutch tortious general clause, derived a "duty of care" to reduce CO_2 emissions.[106] In the grounds for the decision, it referred to the climate agreements under Public International Law. These include:

Climate protection under Public International Law

The *states*—as the addressees of human rights catalogues under Public International Law and, in particular, the 1992 UN Framework Convention on Climate Change of Rio de Janeiro[107], the Kyoto Protocol of 1997[108], and the Paris Agreement of 2015[109]—bear the primary responsibility for reducing greenhouse gas emissions and for adopting climate-friendly measures. Private companies,

[94] Rechtbank Den Haag, fn. 7, section 4.4.49.

[95] See also *Wagner*, RabelsZ 80 (2016), pp. 717, 781.

[96] Rechtbank Den Haag, fn. 7, section 4.4.50; in this direction already *de Jong/Spier*, Climate Change, A Major Challenge and a Serious Threat to Enterprises, DQ 2013, pp. 34, 41; see, from recent past, *Milieudefensie's* campaign from mid-January 2022, fn. 7, demanding BP and Exxon Mobil, among others, to publish plans for a far-reaching reduction in greenhouse gas emissions.

[97] Rechtbank Den Haag, fn. 7, section 4.4.49.

[98] Hoge Raad, fn. 9, Summary.

[99] German Constitutional Court, fn. 17, para. 203; in agreement, *Faßbender*, NJW 2021, pp. 2085, 2091 para. 39.

[100] *Chatzinerantzis/Appel*, NJW 2019, pp. 881, 884 f.; *Wagner/Arntz*, fn. 83, p. 405, paras. 67 ff.; *Wagner*, in: MünchKomm, BGB, 2020, § 823 para. 1055; from Austria, see *Spitzer/Burtscher*, JETL 2017, pp. 137, 160 ff.; but see *Gailhofer/Verheyen*, Klimaschutzbezogene Sorgfaltspflichten: Perspektiven der gesetzlichen Regelung in einem Lieferkettengesetz, ZUR 2021, p. 402; *Pöttker*, fn. 83, pp. 124 ff., 139 f.

[101] *Wagner/Arntz*, fn. 83, p. 405, para. 69.

[102] See German Constitutional Court, Decision of 22.10.1982 – 1 BvL 28/82, juris para. 37.

[103] *Chatzinerantzis/Appel*, NJW 2019, pp. 881, 885; *Wagner/Arntz*, fn. 83, p. 405, paras. 61 f., 69; *Lehmann/Eichel*, RabelsZ 82 (2019), pp. 77, 103 f.

[104] *Chatzinerantzis/Appel*, NJW 2019, pp. 881, 885; for a differentiating view, see *Sach*, Genehmigung als Schutzschild?, 1994, p. 203; *Kloepfer*, Umweltschutz als Aufgabe des Zivilrechts – aus öffentlich-rechtlicher Sicht, NuR 1990, pp. 337, 348.

[105] *Kadner Graziano*, Das auf außervertragliche Schuldverhältnisse anzuwendende Recht nach Inkrafttreten der Rom II-Verordnung, RabelsZ 73 (2009), pp. 1, 49; *Mankowski*, Ausgewählte Einzelfragen zur Rom II-VO: Internationales Umwelthaftungsrecht, internationales Kartellrecht, renvoi, Parteiautonomie, IPRax 2010, pp. 389, 390; *Rüppell*, Die Berücksichtigungsfähigkeit ausländischer Anlagengenehmigungen, 2012.

[106] Rechtbank Den Haag, fn. 7, sections 4.4 ff. On the same basis, in the *Urgenda* case, the Dutch courts also ordered the Dutch government to reduce the Netherlands' greenhouse gas emissions by 25% by the end of 2020 compared to the base year of 1990. Under Dutch tort law, it makes no difference whether the action is brought against a public body or a private person, see *Verschuuren*, fn. 13, pp. 75, 79.

[107] United Nations Framework Convention on Climate Change of 9 May 1992; currently (as of 2.3.2022), it has 197 Parties, https://unfccc.int/process-and-meetings/the-convention/status-of-ratification/status-of-ratification-of-the-convention (2.3.2022).

[108] Kyoto Protocol of 11 December 1997 on the United Nations Framework Convention on Climate Change; by establishing binding deadlines (2008 – 2012; Art. 3 para. 1) and a calendar for reductions (Art. 3 para. 1, Annex B), it specifies the objective of stabilising greenhouse gas concentrations at a level that would prevent dangerous anthropogenic interference with the climate system, as set out in Art. 2 of the Framework Convention on Climate Change. It has 192 Parties to date, https://unfccc.int/process/the-kyoto-protocol/status-of-ratification (2.3.2022).

[109] Paris Agreement of 12 December 2015; it follows the Kyoto Protocol. The 195 states participating in the 21st UN Framework Conference on Climate Change in Paris agreed to limit the increase in the global average temperature to well below 2°C, if possible to 1.5°C, above pre-industrial levels (Art. 2 para. 1(a)).

on the other hand, are not subjects of Public International Law and are therefore not bound by regimes of international conventions.[110]

The Hague District Court did not want to challenge this traditional conception prima facie. First, it stated that the Paris Agreement was not directly binding on Shell.[111] Yet, it promptly followed this assertion with a "but", arguing that the climate protection goals of the Paris Agreement reflected a broad international consensus on the actions required to prevent dangerous climate change.[112] The Court cited this consensus as an argument for concretising the unwritten tortious standard of care and deriving from it a duty to reduce CO_2 emissions.[113] It took up the *Urgenda* judgement[114] by also basing its reasoning on the right to life and limb entrenched in Art. 2 ECHR and the right to respect for private and family life guaranteed in Art. 8 ECHR. In the Dutch Court's opinion, these human rights also included a climatic component.[115]

The mandate for energy supply as a counterargument?

Energy suppliers have a duty under public law to ensure the population's energy supply.[116] The Hague District Court used the catchphrase "the twin challenge"[117] to address the tension between the energy supply mandate on the one hand and the duty to reduce CO_2 emissions on the other hand. While it recognised the importance of access to reliable and affordable energy, especially in the light of Goal 7 of the 17 UN Sustainable Development Goals[118], it refused to conclude that Shell should have a diminished set of duties as a result.[119] Instead, it invoked Goal 13, which calls on the global community to "take urgent action to combat climate change and its impacts".[120] The Court reasoned that the global demand for energy could not be pitted against climate protection but had to be satisfied within the framework established by the climate protection goals of the Paris Agreement.[121]

Operating permits and concessions for the extraction of raw materials (Art. 17 of the Rome II Regulation)

The District Court discussed the role that Shell's operating permits and long-term concessions for oil and gas production should play in establishing a tortious duty to reduce CO_2 emissions.[122]

Pursuant to Art. 17 of the Rome II Regulation, local "rules of safety and conduct" at a place of action that is not the place of effect[123] must be considered within the scope of the applicable (here: Dutch) tort statute. Following the will of the EU legislator and prevailing opinion, these rules also include (foreign) permits and authorisations.[124]

The Hague District Court followed this view[125] but left open the question of where it located the place of action. In determining the applicable tort statute according to Art. 7 of the Rome II Regulation, it held that the place of action was the place where Shell had established its emissions and climate policy (pursuant a board decision at Shell's headquarters which to date are in The Hague).[126] Were we to assume that (only) this same place of action was decisive in cases involving Art. 17 of the Rome II Regulation, then only permits and concessions issued under Dutch law could be taken into account. But in fact, in cases involving Art. 17 of the Rome II Regulation, the source of emissions in question (e.g. the power plant) must be considered the place of action because permits fall under public law and consequently follow the principle of territoriality. For a company with several emitting industrial plants worldwide, there are *several* places of action within the meaning of Art. 17 of the Rome II Regulation. The respective place of action (location of the plant) then determines the substance and scope of the operating permit(s).

In terms of substantive law, the Hague District Court denied that permits and concessions could have any indemnifying effect with regard to a CO_2 reduction obligation.[127] It merely stated that "it is not apparent that CO_2 emissions have played any role whatsoever in these permits and concessions."[128] This falls short. The Rome II Regulation follows the principle of the unity of the

[110] *Nettesheim*, in: Maunz/Dürig, 2021, Art. 32 of the Basic Law para. 40; *Voland*, Unternehmen und Menschenrechte, BB 2015, p. 67 f.

[111] Rechtbank Den Haag, fn. 7, section 4.4.26.

[112] Rechtbank Den Haag, fn. 7, section 4.4.27.

[113] Rechtbank Den Haag, fn. 7, section 4.4.27.

[114] Hoge Raad, fn. 9, sections 5.6.1 ff.; *Hänni*, EuGRZ 2020, pp. 616, 617 f., 624 f.; critically, *van Loon*, fn. 60, section IV. 5. (forthcoming).

[115] Rechtbank Den Haag, fn. 7, section 4.4.9.

[116] See, for the Federal Republic of Germany, § 2 para. 1 of the Energy Industry Law (*Energiewirtschaftsgesetz*, EnWG).

[117] Rechtbank Den Haag, fn. 7, section 4.4.40 ff.

[118] Goal 7: "Ensure access to affordable, reliable, sustainable and modern energy for all".

[119] Rechtbank Den Haag, fn. 7, section 4.4.42.

[120] Rechtbank Den Haag, fn. 7, section 4.4.42.

[121] Rechtbank Den Haag, fn. 7, section 4.4.43.

[122] Rechtbank Den Haag, fn. 7, sections 4.4.44 ff.

[123] See *Junker*, in: MünchKomm, BGB, 2021, Art. 17 of the Rome II Regulation para. 18; *Lehmann,* in: NomosKommentar, Rom-Verordnungen, 2019, Art. 17 of the Rome II Regulation para. 49.

[124] Proposal for a Regulation of the European Parliament and of the Council, COM(2003) 427 final, p. 22; *von Hein*, in: Calliess, Rome Regulations, 2011, Art. 17 Rome II para. 20; *Lehmann,* in: NomosKommentar, Rom-Verordnungen, 2019, Art. 17 of the Rome II Regulation para. 29 ff.

[125] Rechtbank Den Haag, fn. 7, section 4.4.44.

[126] Rechtbank Den Haag, fn. 7, section 4.3.6.

[127] Rechtbank Den Haag, fn. 7, section 4.4.48.

[128] Rechtbank Den Haag, fn. 7, section 4.4.48.

applicable law (*Statutseinheit*)[129] (Art. 15 of the Rome II Regulation). The tort statute comprehensively governs the grounds and consequences of liability, including the question of whether and to what extent permits affect or exclude a person's tortious liability.[130]

Under Dutch law, too, public law permits must be taken into consideration. According to the case law of the *Hoge Raad*, it is necessary to consider issued *building permits* when determining tortious liability.[131] Pursuing the logic of this case law further, we maintain that the court should have scrutinised the substance of the permits and concessions issued to the Shell group companies in question, as well as the regulatory objectives of the provisions on which they are based.

Furthermore, Dutch and Austrian courts have developed the criteria for dealing with foreign permits in other cases of environmental liability. The courts hold that foreign permits must be considered domestically if (i) the emissions are permissible under international law, (ii) the licencing requirements abroad are functionally comparable to those of the *lex fori* and (iii) the foreign affected parties could have been involved in the licencing procedure.[132] While the third criterion may be a good fit for neighbours close to a border (e.g. when a power plant is being built), it is not suited for global climate liability cases.[133] Nevertheless, the legal institution of substitution should serve to make productive use of the second criterion of functional comparability: If the licencing requirements are functionally comparable, foreign permits could have the same effects before a domestic court as domestic permits.[134]

European emissions trading

Under international law, Art. 17 of the Kyoto Protocol (1997) contains the first reference to emissions trading as an optional instrument for reducing greenhouse gases.[135] The EU implemented this option under Community law with Directive 2003/87/EC (which has since been modified several times) and created a system for trading greenhouse gas emission certificates.[136] In the EU, plant operators can no longer use the environmental medium air unlimitedly but require a permit to do so.[137] The permit is linked to the purchase of corresponding emission certificates.[138] While the Paris Agreement (2015) still excluded global emissions trading,[139] the Parties, meeting in November 2021 at the "26th Conference of the Parties (COP 26)" in Glasgow, agreed on cornerstones for the worldwide expansion of emissions trading. In contrast to the European emissions trading system, the scheme is an international trade in emissions reduction credits, not a trade in allowances to emit a certain amount of greenhouse gases.[140] It is linked to the obligations of the countries to reduce their greenhouse gas emissions and allows the transfer of emissions reductions between them.[141]

In the Shell judgement, the Hague District Court declared that, in principle, acquired EU emissions trading certificates—unlike plant operating permits—have an indemnifying effect.[142] It based its reasoning on the *Hoge Raad*'s case law concerning a building permit's effect on private law.[143] If a person who acted in accordance with a permit they had been issued caused damage or nuisance to third parties in the process, their tortious liability would depend on the nature of the permit and the regulatory objective of the provisions on which it was based.[144] The concrete matter at hand involved the interests of the neighbour, who had complained of a nuisance caused by

[129] *Junker*, in: MünchKomm, BGB, 2021, Art. 15 of the Rome II Regulation para. 5.

[130] *Maultzsch*, in: beckOGK Zivilrecht, as of 1.6.2021, Art. 17 of the Rome II Regulation para. 25.

[131] On this, see below, the "European emissions trading" section.

[132] Rechtbank Rotterdam, judgment of 16.12.1983 – Case 4320/74, 3789/77, Ned. Jurispr. 1984, No. 341 para. 8.7, excerpts in *Nassr-Esfahani/Wenckstern,* Der Rheinversalzungsprozess, RabelsZ 49 (1985), pp. 741, 747 ff.; OGH, Judgment of 20.12.1988–2 Ob 656/87, JBl. 1989, p. 239; taking up the criteria, *Kadner Graziano*, RabelsZ 73 (2009), pp. 1, 50; *Matthes*, GPR 2011, pp. 146, 151 f.; *Thorn*, in: Palandt BGB, 2021, Art. 7 of the Rome II Regulation para. 9; *Weller/Nasse/Nasse,* fn. 55, pp. 601, 618.

[133] *Weller/Tran*, ZEuP 2021, pp. 573, 596 f.; for further details, see *Hübner*, IPRax 2022 (forthcoming).

[134] *Hübner*, IPRax 2022 (forthcoming).

[135] Article 17 of the Kyoto Protocol: "The Conference of the Parties shall define the relevant principles, modalities, rules and guidelines, in particular for verification, reporting and accountability for emissions trading. The Parties included in Annex B may participate in emissions trading for the purposes of fulfilling their commitments under Article 3. Any such trading shall be supplemental to domestic actions for the purpose of meeting quantified emission limitation and reduction commitments under that Article."

[136] *Durner*, EurUP 2021, pp. 330, 335.

[137] Art. 4 of the Directive 2003/87/EC: "Member States shall ensure that, from 1 January 2005, no installation undertakes any activity listed in Annex I resulting in emissions specified in relation to that activity unless its operator holds a permit issued by a competent authority in accordance with Articles 5 and 6 (…)."; Germany has implemented this Directive with the Greenhouse Gas Emissions Trade Act (*Treibhausgas-Emissionshandelsgesetz*, TEHG).

[138] See Art. 4 of the Greenhouse Gas Emissions Trade Act.

[139] The Paris Agreement does not contain any explicit regulation on emission certificates. Instead, in Art. 6 paras. 2 and 4, it entrusts the Parties with the option of concluding a (further) agreement in this regard. See also *Durner*, EurUP 2021, pp. 330, 336.

[140] *Frenz*, Klimagipfel Glasgow, UPR 2022, p. 17, 18.

[141] https://unfccc.int/process-and-meetings/the-paris-agreement/the-glasgow-climate-pact/cop26-outcomes-market-mechanisms-and-non-market-approaches-article-6#eq-1 (2.3.2022).

[142] Rechtbank Den Haag, fn. 7, section 4.4.46.

[143] Rechtbank Den Haag, fn. 7, section 4.4.46, there fn. 81.

[144] Hoge Raad, judgment of 21.10.2005 – Case C04/142HR, ECLI:NL:HR:2005:AT8823, section 3.5.1.

an approved construction of an annexe, which interfered with the amount of light he received and with his view. The *Hoge Raad* held that this case required a review to determine whether the statutory regulations on which the building permit was based (Housing Act, Spatial Planning Act) represented a final reconciliation of interests. If this was the case, the Court maintained, a (possibly divergent) reconciliation of interests by means of tort law was precluded.[145]

The Hague District Court accordingly examined the objective and scope of the emissions trading scheme.[146] It asked whether the authorities issuing emission allowances had weighed Shell's interests against the opposing interest of reducing emissions to protect the climate.[147] The court specified limits to the emissions trading system. First, it stated that because only EU companies participate in the European emissions trading system, it could only have an effect within EU borders.[148] Second, it maintained that emission allowances only applied to companies' Scope 1 emissions,[149] i.e. only to a company's direct emissions from sources that it owned or controlled.[150] Thus, they did not have a preclusive effect on Scope 2 and 3 emissions. Third, the court held that the latest emission reduction targets were not sufficient to achieve the objectives of the Paris Agreement.[151] Accordingly, only a small part of Shell's corporate emissions would benefit from the indemnifying effect of EU emissions trading.[152]

Scope of the reduction obligation

The parties' most contested issue concerned the scope of the reduction obligation. The dispute focused on whether Shell's reduction obligation also extended to its Scope 3 emissions, which account for 85% of its total emissions.[153] The Court argued in favour.[154] It derived responsibility for all emissions, including Scope 3 emissions, from the UN Guiding Principles on Business and Human Rights.[155] The principles establish that companies have the duty to respect human rights throughout the entire supply chain. The Hague Court applied this assessment to the issue of emissions.[156] In our opinion, however, extending the reduction obligation to include Scope 3 emissions goes too far.[157]

Separation of powers and justiciability

Climate Litigation provides an occasion to discuss the separation of powers as well as the competences and capability of the judiciary.[158] This applies primarily to public-law proceedings in which a state's climate policy is the subject under dispute.[159] However, the controversy does not stop at public law disputes.[160] In Climate Litigation, civil courts also decide indirectly on a society's climate policy.[161]

In German private law, the question of justiciability is embedded in traditional legal institutions of tort law or of property law. Thus, the issue of justiciability influences individual elements that establish liability, such as adequacy and attributability, the doctrine of the duty of care towards third parties (*Verkehrspflichtendogmatik*), or the concept of the disturber (*Störer*) under § 1004 of the German Civil Code.[162] US courts address the problem more explicitly and sometimes invoke the political

[145] Hoge Raad, fn. 144, section 3.5.1 ff.

[146] Rechtbank Den Haag, fn. 7, section 4.4.45 f.

[147] Rechtbank Den Haag, fn. 7, section 4.4.46.

[148] Rechtbank Den Haag, fn. 7, section 4.4.45.

[149] Rechtbank Den Haag, fn. 7, section 4.4.45.

[150] The Greenhouse Gas Protocol, fn. 6, pp. 25, 27.

[151] Rechtbank Den Haag, fn. 7, section 4.4.46.

[152] Rechtbank Den Haag, fn. 7, section 4.4.47.

[153] Rechtbank Den Haag, fn. 7, sections 2.5.5, 4.4.25.

[154] Rechtbank Den Haag, fn. 7, section 4.4.18.

[155] Rechtbank Den Haag, fn. 7, sections 4.4.11 ff.; on corporate responsibility under the UN Guiding Principles, see *Paschke*, Extraterritoriale Sorgfaltspflichten von Außenwirtschaftsunternehmen zur Achtung von Menschenrechten ante portas?, RdTW 2016, pp. 121, 122 f.

[156] The Hague District Court based its reasoning inter alia on *Hale/Oxford University Net Zero Network*, Mapping of current practices around net zero targets, 2020, https://netzeroclimate.org/wp-content/uploads/2020/12/Net-Zero-Target-Map.pdf (2.3.2022), see Rechtbank Den Haag, fn. 7, section 4.4.18.

[157] See below, the "Scope of the reduction obligation (Scope 3)" section.; along these lines also *Ortlieb*, Anmerkung zu der Entscheidung gegen die Royal Dutch Shell, EweRK 2021, pp. 181, 183.

[158] Critically, *Bickenbach*, Subjektiv-öffentliches Recht auf Klimaschutz? Die Erderwärmung vor den Gerichten, JZ 2020, pp. 168, 177; *Chatzinerantzis/Appel*, NJW 2019, pp. 881, 886; *Wagner*, fn. 77, p. 111 ff.; *Wagner*, NJW 2021, pp. 2256, 2259 f. paras. 22 ff.; *Wegener*, Urgenda – Weltrettung per Gerichtsbeschluss?, ZUR 2019, p. 10 ff.; *Wegener*, NJW 2022, pp. 425, 426 para. 11, 429 para. 28; *Spieth/Hellermann*, Not kennt nicht nur ein Gebot – Verfassungsrechtliche Gewährleistungen im Zeichen von Corona-Pandemie und Klimawandel, NVwZ 2020, pp. 1405, 1407 f., but see *Graser*, Vermeintliche Fesseln der Demokratie: Warum die Klimaklagen ein vielversprechender Weg sind, ZUR 2019, p. 271 ff.; *van Loon*, fn. 66, section IV. 1. (forthcoming); *Verheyen*, Klagen für Klimaschutz, ZRP 2021, pp. 133, 136; for an assessment of opportunities and risks, see *Friedrich*, Gemeinwohl vor Gericht: Chancen und Risiken öffentlich-rechtlicher „Public Interest Litigation", DÖV 2021, p. 726 ff.; for a neutral assessment, see *Sindico/Mbengue/McKenzie*, fn. 83, pp. 1, 23 f.

[159] See, in detail, *Payandeh*, The role of courts in climate protection and the separation of powers, in: Kahl/Weller (eds.), Climate Change Litigation,2020, p. 62 ff.

[160] See *Bach/Kieninger*, JZ 2021, pp. 1088, 1098; *Spieth/Hellermann*, NVwZ 2020, pp. 1405, 1407 f.; *Wagner*, NJW 2021, pp. 2256, 2261 f. para. 38 ff.; *Wegener,* NJW 2022, pp. 425, 430 paras. 38 ff.

[161] International Commission of Jurists, Courts and the legal enforcement of economic, social and cultural rights: comparative experiences of justiciability, 2008, p. 33, https://perma.cc/YU9F-YCNR (2.3.2022); *Spieth/Hellermann*, NVwZ 2020, pp. 1405, 1407 f.; *Wagner*, fn. 77, p. 114 f.; *Wagner*, NJW 2021, pp. 2256, 2261 para. 39.

[162] *Wagner/Arntz*, fn. 83, p. 405, paras. 48 ff., 63 ff., 88 f.; *Wagner*, fn. 77, p. 47 ff.; *Weller/Tran*, ZEuP 2021, pp. 573, 604.

question doctrine to dismiss climate litigation.[163] Shell tried to play this card before the Hague District Court.[164] But since Dutch law does not have any admissibility constraints comparable to the political question doctrine, the Court had to rule on the merits of the pending case.[165]

Can the statements of the Shell case be applied to German law?

The widespread international impact of the *Urgenda* judgement raises the question of whether *Milieudefensie et al. v. Shell* has established momentum for similar litigation worldwide. A strong network of NGOs that positions individual cases in order to pressure market participants to act, thereby prompting a change towards greater climate protection in society as a whole (so-called "strategic litigation"[166]), would lead us to expect corresponding litigation activities.[167] Greenpeace and the association Environmental Action Germany have already brought actions against VW, Daimler, and BMW as well as the oil and gas producer Wintershall Dea in the second half of 2021. They are demanding that the automotive groups phase out internal combustion engines by 2030. Furthermore, Wintershall Dea should commit to refrain from tapping any new oil and gas fields from 2026 at the latest.[168]

From the perspective of domestic companies, the pressing question is likely to be whether actions brought in Germany could lead to comparable judgements.

Private International Law

Pursuant to Art. 288 of the TFEU, the Brussels Ibis and Rome II Regulations are also directly applicable law in Germany. Consequently, German courts could certainly co-opt The Hague Court's reasoning. However, in the absence of a preliminary ruling by the CJEU, the reasoning does not have a binding effect.[169]

The admissibility of actions by NGOs

On the other hand, from a procedural perspective, it bears noting that the provision of Art. 3:305a of the Dutch Civil Code, on which the NGOs *Urgenda* and now also *Milieudefensie* could base their standing to sue, has no equivalent in German law.[170]

Tortious liability

Unlike Private International Law and International Civil Procedure Law, which are harmonised or even unified throughout Europe, there are sometimes considerable differences between national tort laws. Nevertheless, all states have comparable basic categories of tortious liability.[171] In particular, this holds true for the general

[163] *Connecticut v. American Electric Power Co.*, Inc, 406 F. Supp. 2 d 265, 267, 273 (S. D.N. Y. 2005): "[C]ases presenting political questions are consigned to the political branches that are accountable to the People, not to the Judiciary, and the Judiciary is without power to resolve them. This is one of those cases." See also *People of the State of California v. General Motors Corp.*, 2007 WL 2726871 (N. D. Cal. 2007), 11 f.: "[T]he adjudication of Plaintiff's claim would require the Court to balance the competing interests of reducing global warming emissions and the interests of advancing and preserving economic and industrial development. […] The balancing of those competing interests is the type of initial policy determination to be made by the political branches, and not this Court."; *Native Village of Kivalina v. ExxonMobil Corp.*, 663 F.Supp.2 d 863 (N. D. Cal. 2009), 6 ff.; on this issue, see also *Kieninger*, fn. 55, p. 119 para. 10; *Pöttker*, fn. 83, p. 255 ff.

[164] Rechtbank Den Haag, fn. 7, section 4.1.3.

[165] Rechtbank Den Haag, fn. 7, section 4.1.3.

[166] *European Center for Constitutional and Human Rights*: "Strategic litigation aims to bring about broad societal changes beyond the scope of the individual case at hand. It aims to use legal means to tackle injustices that have not been adequately addressed in law or politics. […] Successful strategic litigation brings about lasting political, economic or social changes and develops the existing law.", https://www.ecchr.eu/en/glossary/strategic-litigation/ (21.7.2021); on this issue, see also *Oexle/Lammers*, Klimapolitik vor den Verwaltungsgerichten – Herausforderungen der "climate change litigation", NVwZ 2020, pp. 1723, 1724; *Wegener*, NJW 2022, pp. 425, 427 paras. 14 ff.

[167] Peer de Rijk, policy officer at *Milieudefensie*, has already announced that companies that do not comply with the demand to publish plans for a far-reaching reduction in greenhouse gas emissions, see fn. 7, may face legal action, see https://www.reuters.com/markets/commodities/activists-behind-shell-climate-verdict-target-30-multinationals-2022-01-13/ (1.3.2022); on the role of non-state actors (private persons, associations, NGOs) in climate litigation worldwide, see *Streck*, Filling in for Governments? The Role of the Private Actors in the International Climate Regime, (2020) 17 JEEPL, p. 5 ff.

[168] See statement of claim Greenpeace ./. VW AG of 8.11.2021, available at https://www.greenpeace.de/publikationen/vw_klage_final_small_0.pdf (2.3.2022); statement of claim Deutsche Umwelthilfe e.V. ./. Mercedes-Benz AG of 21.09.2021, https://www.duh.de/fileadmin/user_upload/download/Pressemitteilungen/Umweltpolitik/Klimaschutz/Klageschrift_Mercedes-Benz.pdf (2.3.2022); statement of claim Deutsche Umwelthilfe e.V. ./. BMW AG of 21.09.2021, https://www.duh.de/fileadmin/user_upload/download/Pressemitteilungen/Umweltpolitik/Klimaschutz/Klageschrift_BMW.pdf (2.3.2022); statement of claim Deutsche Umwelthilfe e.V. ./. Wintershall Dea AG of 04.10.2021, https://www.duh.de/fileadmin/user_upload/download/Pressemitteilungen/Energie/Klimaklage_WintershallDea.pdf (2.3.2022); on the proceedings from the perspective of possible claims of recourse against the state after losing a case, *Risse/Haller*, Klimaschutzklagen und Streitverkündung gegen den Staat, NJW 2021, p. 3500 ff.

[169] The CJEU's judgements on the interpretation of Union law have only limited erga omnes effect outside the main proceedings, i.e., courts may repeatedly refer the already answered question to the CJEU. Only the court of last instance has an obligation to refer if it intends to deviate from the CJEU's case law, see *Karpenstein*, Das Recht der Europäischen Union, 2021, Art. 267 of the TFEU paras. 104 ff.; *Marsch*, in: Schoch/Schoch, VwGO, February 2021, Art. 267 of the TFEU para. 64 f.; *Wegener*, in: Calliess/Ruffert, EUV/AEUV, 2016, Art. 267 (ex-Art. 234 ECT) para. 51.

[170] *Ortlieb*, EWeRK 2021, pp. 181, 183; *Saurer/Purnhagen*, Klimawandel vor Gericht – Der Rechtsstreit der Nichtregierungsorganisation "Urgenda" gegen die Niederlande und seine Bedeutung für Deutschland, ZUR 2016, pp. 16, 20 ff.

[171] *Wagner*, RabelsZ 80 (2016), pp. 717, 751; *Spitzer/Burtscher*, JETL 2017, pp. 137, 155 f.

tortious standard of care.[172] As an "autonomous 'generator of rules' in tort law", it joins the programme of duties standardised by the legislature. In Germany, this takes the form of the duties of care towards third parties (*Verkehrspflichten*).[173]

Duties of care towards third parties

In the Netherlands, Art. 6:162.2 of the Dutch Civil Code[174] regulates when a person has committed misconduct that is relevant to liability.[175] It specifies three forms: (i) the violation of another person's rights, (ii) the violation of a protective law and (iii) the violation of the unwritten standard of care, which is the focus here. The latter is a standard that is open to further legal development, the substance of which the courts must establish in each individual case.[176]

The German counterpart is the duties of care towards third parties, developed in case law within the framework of § 823 para. 1 of the German Civil Code.[177] Many aspects that are taken into account across various legal orders determine whether there is a duty of care or a duty of care towards third parties and what its substance is. These aspects include the foreseeability and probability of the occurrence of damage, the severity of the impending consequences, the extent of the damage and the significance of the threatened right, the possibility of reducing or avoiding the danger, the costs of doing so, the economic acceptability of taking these measures, the social utility of the conduct causing the damage, and justified expectations of care towards third parties.[178]

In this flexible system, which resembles a collection of general clauses, normative assessments under constitutional and administrative law and private regulations provide orientation.[179] The "indirect third-party effect" (*mittelbare Drittwirkung*) of fundamental rights in German law[180] is the doctrinal counterpart to the Hague District Court's consideration of the European Convention on Human Rights. The Court turned to the Convention because, in Dutch law, it even has primacy over national constitutional law.[181]

Instruments of soft law can also be used to concretise the duties of care towards third parties.[182] The expectations of conduct expressed in soft law can help shape the relevant standard of care.[183] The UN Guiding Principles on Business and Human Rights, which the Hague Court employed to concretise the standard of care,[184] belong to soft law.[185] However, the Court should have explained first to what extent this soft law reflected current expectations of care towards third parties. In the next step, the latter could then have been used to establish a duty of care towards third parties. However, the Hague Court omitted this two-step process without further ado by applying the UN Guiding Principles with binding effect to Shell's detriment.[186]

The interface between public and private law

There are also parallels between various legal orders where the interface between public law and private law is concerned. Standards of conduct and conditions

[172] *von Bar*, Gemeineuropäisches Deliktsrecht, 1999, § 2 para. 224; *van Dam*, Tort Law and Human Rights: Brothers in Arms on the Role of Tort Law in the Area of Business and Human Rights, 2 JETL (2011), p. 221; 237: "The standard of care in tort law can therefore be seen as a universal rule that applies between people, businesses and public bodies. It is the universal standard for decent human behaviour; the basic rule of humanity."

[173] *von Bar*, fn. 172, § 2 para. 224.

[174] Art. 6:162 of the Dutch Civil Code: "(1) A person who commits a tortious act (unlawful act) against another person that can be attributed to him, must repair the damage that this other person has suffered as a result thereof. (2) As a tortious act is regarded a violation of someone else's right (entitlement) and an act or omission in violation of a duty imposed by law or of what according to unwritten law has to be regarded as proper social conduct, always as far as there was no justification for this behaviour. (3) A tortious act can be attributed to the tortfeasor [the person committing the tortious act] if it results from his fault or from a cause for which he is accountable by virtue of law or generally accepted principles (common opinion)."

[175] *von Bar*, fn. 172, § 2 para. 217.

[176] See *van Loon*, fn. 60, section IV. 4. (forthcoming).

[177] See *von Bar*, fn. 172, § 2 para. 214; *Sprau*, in: Grüneberg, BGB, 2022, § 823 of the German Civil Code para. 51.

[178] *von Bar*, fn. 172, § 2 para. 225; with regard to Art. 6:162.2 of the Dutch Civil Code *Verheij/Hage/Lodder*, Logical tools for legal argument: a practical assessment in the domain of tort, ICA'L '97, 243, 247; for German law, see *Spindler*, in: BeckOGK Zivilrecht, as of 1.5.2021, § 823 of the German Civil Code para. 392; *Wilhelmi*, in: Erman, BGB, 2020, § 823 of the German Civil Code para. 80.

[179] *Förster*, in: BeckOK BGB, 58th edition, as of 1.5.2021, § 823 of the German Civil Code paras. 344 ff.; *Wilhelmi*, in: Erman, BGB, 2020, § 823 of the German Civil Code paras. 82, 88.

[180] *Wagner*, RabelsZ 80 (2016), pp. 717, 721 f.; the concept is settled case law – but see German Constitutional Court, Decision of 11.4.2018 – 1 BvR 3080/09, NJW 2018, p. 1667 paras. 31 ff.

[181] *Myjer*, Dutch Interpretation of the European Convention: a double system?, in: FS Wiarda, 1988, p. 421 ff.; in Germany, by contrast, the ECHR only has the status of a simple federal law (Art. 59 para. 2 of the Basic Law).

[182] *Mansel*, ZGR 2018, p. 450 f.; *Paschke*, RdTW 2016, pp. 121, 127; *Saage-Maaß/Leifker*, Haftungsrisiken deutscher Unternehmen und ihres Managements für Menschenrechtsverletzungen im Ausland, BB 2015, pp. 2499, 2503 f.; but see, for a critical assessment, *Ortlieb*, EWeRK 2021, pp. 181, 183.

[183] *Weller/Thomale*, ZGR 2017, p. 509 ff.

[184] Rechtbank Den Haag, fn. 7, section 4.4.11.

[185] UN, Guiding Principles on Business and Human Rights, 2011, General Principle: "Nothing in these Guiding Principles should be read as creating new international law obligations […]"; on the functions of soft law, *van Dam*, 2 JETL (2011) pp. 221, 239.

[186] Critically also *Ekardt/Heß/Wulff*, EurUP 2021, pp. 212, 224; *Laurer*, Guest Commentary: An Assessment of the Hague District Court's Decision in Milieudefensie et al. v. Royal Dutch Shell plc. Royal Dutch Shell plc, blog post of 28 May 2021, http://blogs.law.columbia.edu/climatechange/2021/05/28/guest-commentary-an-assessment-of-the-hague-district-courts-decision-in-milieudefensie-et-al-v-royal-dutch-shell-plc/ (2.3.2022); *Nollkaemper*, Shell's Responsibility for Climate Change, An International Law Perspective on a Groundbreaking Judgment, blog post of 28 May 2021, https://verfassungsblog.de/shells-responsibility-for-climate-change/ (2.3.2022).

contained in the permit must be considered when determining the duties of care towards third parties under German law, but in individual cases, the addressee may be required to exercise greater care under private law.[187]

Yet the Dutch decision did not undertake such a case-by-case analysis, thus reducing its potential persuasive power as a source of inspiration for a German court. The same applies to the area of emissions trading, whose relationship to tortious liability under private law the Hague Court did not address.

Scope of the reduction obligation (Scope 3)

The scope of the reduction obligation continues to be problematic. The Hague Court stated that Shell is also responsible for Scope 3 emissions and must reduce them.[188] An analogy to product liability law could serve as grounds for such a statement[189]: Considering its climate impact, an energy package that relies largely on fossil fuels is not constituted to avoid impairment of third-party legal interests when used in foreseeable ways. In this sense, we could speak of a "construction defect" (*Konstruktionsfehler*)[190].

However, product liability law also presupposes concrete and clearly imputable violations of legal interests, which, for CO_2 emissions, would have to be attributed to a specific energy package. This seems (too) far-fetched. From the perspective of German tort law, a comprehensive attribution of greenhouse gas emissions along the entire supply chain, including the emissions of final consumers who fill their tanks with Shell fuel, cannot be doctrinally persuasive.[191]

First, in principle, tortious liability only encompasses an individual's own actions and sphere, not the actions and sphere of third parties.[192] Buyers and final consumers act autonomously, thereby terminating tortious imputability in supply chains as well as the first trader's responsibility to act (in this case Shell). If one wanted to push back certain products for political reasons, the steering instruments of public or tax law would be required instead. Considering that its telos is compensation, tortious liability is not the right instrument.

What is more, Scope 3 liability is at odds with the concept of European emissions trading as a cornerstone of European climate policy. European emissions trading follows the so-called downstream approach,[193] meaning that the actor who concludes the value or pollution creation chain—in this case, the final consumer of fossil fuels—must hold emission permits.[194] But the Hague District Court attributed primary liability to the fuel producer (the so-called upstream approach).[195]

Finally, the recently adopted Act on Corporate Due Diligence in Supply Chains (*Lieferkettensorgfaltspflichtengesetz*)[196] limits corporate responsibility to comply with human rights and environmental duties of care to companies' *own* legal sphere and (only) to the *first* downstream level, i.e. direct suppliers (the so-called Tier 1 principle).[197] Putting private climate change responsibilities alongside this recent legislative decision in the area of supply chain governance for a tier 1 limitation, it seems too broad for the former to follow the Dutch example and include Scope 3 emissions. After all, if the concrete responsibility to protect human rights is already limited to the level of the first business partner, climate liability, which is vaguer in comparison, cannot encompass further levels.

[187] German Federal Court of Justice, judgment of 31.05. 1994 - VI ZR 233/93, NJW 1994, pp. 2232, 2233; Higher Regional Court Jena, Decision of 6.10.2005 – 4 U 882/05, NJW 2006, pp. 624, 625; Higher Regional Court Karlsruhe, Decision of 12.4.2006 – 1 U 102/05, NJW-RR 2006, p. 1167, *Wagner*, Öffentlich-rechtliche Genehmigung und zivilrechtliche Rechtswidrigkeit, 1989.

[188] On this matter, see above, the "Scope of the reduction obligation" section.

[189] Thus *Leone*, Putting the heat on the fossil fuel industry: using products liability in climate change litigation, 21 B.U. PUB. INT. L.J. (2012), p. 365 ff.

[190] See German Federal Court of Justice, judgment of 16.6.2009 - VI ZR 107/08, juris para. 14 (with further references); *Spindler*, in: beckOGK Zivilrecht, as of 1.5.2021, § 823 of the German Civil Code paras. 638 ff.

[191] In this vein, see also *Nollkaemper,* fn. 186.

[192] *Wagner*, RabelsZ 80 (2016), pp. 717, 758; *Habersack/Ehrl*, Verantwortlichkeit inländischer Unternehmen für Menschenrechtsverletzungen durch ausländische Zulieferer – de lege lata und de lege ferenda, AcP 219 (2019), pp 155, 197; *Weller/Kaller/Schulz*, Haftung deutscher Unternehmen für Menschenrechtsverletzungen im Ausland, AcP 216 (2016), pp. 387, 401; *Weller/Nasse,* Menschenrechtsarbitrage als Gefahrenquelle, ZGR Sonderheft 22 (2020), pp. 107, 124.

[193] *Ministry of the Environment, Climate Protection and the Energy Sector Baden-Württemberg/Fraunhofer Institute for Systems and Innovation Research* (eds.), Flexible Instrumente im Klimaschutz, 2005, p. 80, http://publica.fraunhofer.de/eprints/urn_nbn_de_0011-n-313220.pdf (2.3.2022); *Kreuter-Kirchhof*, EuZW 2004, pp. 711, 712.

[194] *Ministry of the Environment, Climate Protection and the Energy Sector Baden-Württemberg/Fraunhofer Institute for Systems and Innovation Research* (eds.), fn. 200, p. 687.

[195] See *Ministry of the Environment, Climate Protection and the Energy Sector Baden-Württemberg/Fraunhofer Institute for Systems and Innovation Research* (eds.), fn. 200, p. 722.

[196] Gesetz über die unternehmerischen Sorgfaltspflichten zur Vermeidung von Menschenrechtsverletzungen in Lieferketten, 16. 7.2021, BGBl. I S. 2959; on this, see *Leuering/Rubner*, Lieferkettensorgfaltspflichtengesetz, NJW-Spezial 2021, p. 399 ff.; *Wagner/Rutloff*, Das Lieferkettensorgfaltspflichtengesetz – Eine erste Einordnung, NJW 2021, p. 2145 ff.; in the run-up to the enactment *Hübner*, Bausteine eines künftigen Lieferkettengesetzes, NZG 2020, p. 1411 ff.

[197] Pursuant to § 2 para. 5 no. 3 of the Act on Corporate Due Diligence in Supply Chains , the term "supply chain" also covers the actions of an indirect supplier. However, the canon of duties is significantly reduced for the own area of business and that of the direct supplier (§ 9 of the Act on Corporate Due Diligence in Supply Chains); on anchoring climate protection-related due diligence obligations in the Act on Corporate Due Diligence in Supply Chains de lege ferenda, see *Gailhofer/Verheyen*, ZUR 2021, p. 402 ff.

Concluding theses

(1) It is necessary to distinguish between vertical and horizontal Climate Litigation. Vertical climate actions (NGO versus the state) generally fall under public law. They are brought before the administrative and constitutional courts. The state's protective duties concerning fundamental and human rights as well as obligations under international law arising from ratified international agreements constitute the standard of review.

(2) Horizontal actions between private individuals and companies are brought before civil courts and typically have tortious bases for claims. Fundamental and human rights have an indirect horizontal effect in these cases. Through the interpretation of general clauses and open elements of tort law (e.g. "faute" or unlawfulness), these fundamental and human rights are used to further develop the private law by establishing new duties of care towards third parties that are intended to protect the climate.

(3) The Shell case was the first horizontal climate action that was successful in the first instance and focused on the protection of the global climate. The Hague District Court imposed a duty on Shell to significantly reduce its CO_2 emissions. For the first time, a court constructed, from a bundle of multiple individual considerations, a duty of care towards third parties to reduce CO_2 emissions. The court's reasoning here is not sufficiently persuasive. Its observations on the indemnifying effect of operating permits and acquired EU emission certificates also fall short.

(4) From the perspective of the plaintiffs (NGOs), substantive law poses the greatest hurdles for horizontal climate actions that seek to reduce CO_2 emissions. The individual violation of legal interests (climate change as a problem of the commons), questions of causality and attribution/imputability, and the illegality of the corporate activity that emits greenhouse gases are all problematic issues.

(5) The Shell ruling cannot simply be transposed into the German legal order. While the German doctrine of a duty of care towards third parties (*Verkehrspflichtendogmatik*) allows—in general and if necessary—for the creation of new duties, it would require a more profound justification than that provided by the Hague decision to establish an unwritten obligation to reduce CO_2 emissions.

(6) The Shell ruling affirms corporate liability for Scope 3 emissions, i.e. a comprehensive attribution of greenhouse gas emissions along the entire supply chain, including the emissions of final consumers filling their tank with fuel. However, the inclusion of Scope 3 emissions is not persuasive from the perspective of German tort doctrine (principle of immediacy, *Unmittelbarkeitsgrundsatz*) and of the new German Act on Corporate Due Diligence in Supply Chains (2021), which limits chain responsibility to the first supplier level (tier 1 principle).

(7) From the perspective of legal realism, however, especially as a result of worldwide publicity and media-effective presentation by the globally networked NGO scene, the Shell ruling provides a momentum that cannot be overlooked. The German Constitutional Court has set an example by taking a comparative law "look over the rim of its teacup". In its climate decision, it turned to foreign court decisions as a source of inspiration.[198] If this inspiration for horizontal actions is taken further, the Shell case could also lead private law to become an important instrument in the efforts to reduce greenhouse gas emissions. Taking into account that the German Constitutional Court's climate decision was received with (surprisingly) open arms at the political level,[199] the Shell case even has the potential to act as a catalyst beyond climate litigation in the field of climate action as a whole.

Authors' contributions
All authors contributed to the study conception and design. Material preparation, data collection and analysis were performed by Prof. Dr. Marc-Philippe Weller and Mai-Lan Tran. The first draft of the manuscript was written by Mai-Lan Tran and all authors commented on previous versions of the manuscript. All authors read and approved the final manuscript. The translation into the English language was supported by Dr. Naomi Shulman.
The submitted work has been published partially in German, see Weller/Tran, Milieudefensie et al. versus Shell: Auswirkungen für Klimaklagen gegen deutsche Unternehmen, EurUP 2021, p. 342 ff.

Funding
For the publication fee we acknowledge financial support by Deutsche Forschungsgemeinschaft within the funding programme "Open Access Publikationskosten" as well as by Heidelberg University. No funds, grants, or other support was received.

[198] German Constitutional Court, fn. 13, paras. 157, 200, 203.

[199] The Federal Government already approved a revised bill with tightened climate targets on 12 May 2021, which was passed by the German Bundestag on 23 June 2021. The amendment came into force on 31 August 2021.

Availability of data and materials
All data generated or analysed during this study are included in this published article.
Code availability (software application or custom code): not applicable

Declarations

Competing interests
The authors declare that they have no competing interests.

Received: 14 March 2022 Accepted: 6 May 2022
Published online: 04 July 2022

Publisher's Note